

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of)
)
Rules and Policies on)
Foreign Participation in the)
U.S. Telecommunications Market)

IB Docket No. 97-142

COMMENTS OF
INDUS, INC.

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SUMMARY

Indus shares in the Commission's opinion of the benefits to U.S. consumers from implementation of the WTO Basic Telecommunications Agreement. To permit full realization of these benefits, the Commission should adopt the following recommendations:

- Eliminate the effective competitive opportunities test for investors from WTO Member Countries;
- Quickly fashion streamlined rules to facilitate foreign investment in U.S. wireless enterprises; and,
- Reform the C Block PCS ownership and attribution rules so that C Block PCS licensees may attract greater levels of foreign capital enabling more rapid provision of service to the public.

Expeditious adoption of these recommendations will permit U.S. consumers to experience fully the opportunities and benefits of the WTO Agreement.

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Indus, Inc. ("Indus")¹ hereby submits its comments in the above-captioned proceeding.

I. INTRODUCTION

The Basic Telecommunications Agreement signed by 69 countries under the auspices of the World Trade Organization is no less consequential in U.S. telecommunications history than passage of the 1996 Telecommunications Act. The Agreement effects the global development of telecommunications competition by opening markets heretofore dominated by monopolies. The extent of the resulting global change is not yet fully comprehended.

The significance for the U.S. domestic telecommunications market is no less vast. The removal of indirect foreign ownership restrictions fundamentally alters the traditional structure of the telecommunications market by inviting enormous

¹ Indus is the licensee of the C Block PCS BTA covering Milwaukee, Wisconsin.

capital investment from abroad and enabling competition to thrive. The Commission's unilateral attempts to secure the benefits of global competition for U.S. consumers can now defer comfortably to the greater effectiveness of an international multilateral commitment to the same.

II. ELIMINATION OF THE ECO TEST FOR INVESTORS FROM WTO MEMBER COUNTRIES WILL SERVE THE PUBLIC INTEREST.

To promote effective competition in the U.S. telecommunications market, the Commission adopted the effective competitive opportunities ("ECO") test as an element of a Section 310(b)(4) public interest determination.² The ECO test was designed to prevent foreign entities from leveraging foreign monopoly power into U.S. telecommunications markets and impairing competition. The ECO test sought to ensure that home countries of foreign investors in U.S. telecommunications companies had established frameworks to ensure effective competitive opportunities to U.S. firms in similar market segments. The Commission noted that

[t]he [ECO] test will promote increased competition in the U.S. telecommunications market, thus furthering the public interest by reducing rates charged to consumers, increasing the quality of services, and encouraging the development of new and innovative services for U.S. consumers.³

² See Market Entry and Regulation of Foreign-affiliated Entities, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 at ¶ 182 (1995) ("Foreign Carrier Entry Order").

³ Id. at ¶ 238.

The Commission adopted the ECO test at a time when the United States offered one of the most competitive telecommunications markets in the world and, by contrast, many other countries maintained monopolies in many telecommunications service sectors.⁴ However, the obligations recently assumed by the United States and 68 other nations under the World Trade Organization Basic Telecommunications Agreement ("WTO Agreement") nullify the premise favoring the adoption and use of the ECO test with respect to WTO Member Countries. In light of these changed circumstances, the Commission properly considers the necessary changes to its rules concerning foreign ownership.⁵

A. The WTO Agreement Promotes the Commission's Interest in Preventing Anticompetitive Conduct by Foreign Carriers Against Unaffiliated U.S. Carriers.

The WTO Agreement addresses the Commission's valid concerns about the abilities of foreign carriers to leverage foreign monopoly power into U.S. markets or otherwise engage in anticompetitive conduct against unaffiliated U.S. carriers. As the Notice⁶ observes, the General Agreement on Trade in Services

⁴ See *id.* at ¶ 12 ("In many countries, even those moving toward competition, significant monopoly control, or control over bottleneck services and facilities, continues to be held by national carriers").

⁵ See *id.* at ¶ 244 ("If the United States schedules commitments for market access and national treatment at the conclusion of the work of the Negotiating Group on Basic Telecommunication, then we may be obliged to revisit these rules at that time"); see also *Bechtel v. F.C.C.*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("[C]hanges in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy . . .").

⁶ Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, *Order and*

("GATS") requires Member Countries "to treat companies from other WTO Members as it treats its own companies."⁷ Moreover, sixty-five government signatories to the WTO Agreement have committed to ensuring that "dominant carriers provide nondiscriminatory and timely interconnection to their competitors at cost-oriented rates" and "have also bound themselves to take measures to prevent other forms of anticompetitive conduct."⁸ Finally, the U.S. Government may seek enforcement of a signatory's commitments through the WTO dispute settlement process which allows the remedy of trade retaliation in the telecommunications sector.⁹

In addition to the broad principles of the WTO Agreement, the specific commitments pledge open markets for wireless carriers. The Notice observes that "[t]wenty seven other countries, including virtually all of the world's major markets, have agreed to open their markets to 100 percent foreign investment in wireless services as of January 1, 1998, and 17 others will phase in full openness beginning in 1999."¹⁰ In addition to open markets, monopoly leveraging of wireless

Notice of Proposed Rulemaking, FCC 97-195 (rel. June 4, 1997) ("Notice").

⁷ Id. at ¶ 22 (citing General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (1994) at art. XVII).

⁸ Notice at ¶ 24.

⁹ Id. at ¶ 23.

¹⁰ Id. at ¶ 73.

services is difficult because of their wholly domestic nature.¹¹ Thus, the terms of the WTO Agreement combined with the uniquely competitive nature of wireless markets predicts an opening of wireless markets abroad and a diminished threat of anticompetitive conduct by foreign carriers.

In short, the terms and conditions of the WTO Agreement encompass the principles supporting the Commission's ECO test and thereby foreclose its further application. In fact, the WTO Agreement fulfills the Commission's foreign carrier policy by compelling foreign governments to effect operation of the principles on a multilateral international basis.

B. The WTO Agreement Renders the ECO Test Unnecessary.

Because the WTO Agreement addresses the Commission's foreign carrier policy concerns in an effective manner with specific enforcement provisions, it renders the ECO test unnecessary for foreign investors from WTO Member Countries. For this reason, Indus supports the Commission's proposal to "eliminate the ECO test as a component of the Section 310(b)(4) public interest analysis for common carrier applicants with investment by entities from WTO countries."¹²

Indeed, retention of the ECO test would disserve the public interest to the extent that it hinders foreign investment in U.S. wireless licensees. The Commission has received comments on the limited capital opportunities available to C Block PCS licensees

¹¹ See id.

¹² Id. at ¶ 74.

and the need for C Block debt restructuring.¹³ Investments from WTO Member Countries may offer valuable assistance to C Block licensees in their efforts to provide competitive services to the public. Retention of the ECO test would unnecessarily complicate, delay, or prevent needed investment for the enhancement of competitive alternatives for consumers. Because the concerns underlying the ECO test are resolved by the WTO Agreement, its retention would operate only as a barrier to the competitive policies of the Commission.

III. THE COMMISSION SHOULD FASHION STREAMLINED, UNCOMPLICATED RULES TO FACILITATE FOREIGN INVESTMENT IN U.S. WIRELESS CARRIERS.

The investment of foreign capital in U.S. wireless markets will enhance the development of wireless services bringing benefits to consumers and licensees. To promote the process of market expansion and dynamism, the Commission should fashion streamlined, uncomplicated rules to advance the course of securing foreign investment.

Indus supports the Commission's reluctance to deny a license based on foreign ownership concerns.¹⁴ Parties seeking to deny a license on indirect foreign ownership grounds should be required to show that grant of the application would pose a very high risk

¹³ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Public Notice*, DA 97-679 (rel. June 2, 1997).

¹⁴ See Notice at ¶ 75 ("We do not anticipate that we would easily be persuaded that the public interest would be served by denying a license based on Section 310(b)(4) concerns, absent serious concerns raised by the Executive Branch").

to competition not otherwise addressable.¹⁵ Moreover, the Commission should impose penalties on superfluous petitions designed not to address legitimate competition concerns but to delay the licensing process.

Limits on indirect foreign ownership of U.S. wireless licensees by parties from WTO Member Countries should be removed not only for future and pending applications, but for existing licensees, as well. Additional foreign capital will assist in the construction of high quality networks and the development of innovative services. The availability of additional investment sources will assist greatly the C Block PCS licensees in their attempts to provide service to the public.¹⁶

IV. THE COMMISSION CAN MAXIMIZE THE EFFECT OF WTO IMPLEMENTATION FOR THE WIRELESS INDUSTRY BY ALTERING ITS OWNERSHIP AND ATTRIBUTION RULES.

As stated herein, the Commission can enhance consumer welfare by increasing the number of wireless service providers.

¹⁵ See id.

¹⁶ The concerns which resulted in the Commission's ECO test continue to exist for some non-WTO Member Countries. However, the benefits of telecommunications competition experienced by WTO Member Countries will exert considerable pressure on non-WTO Members to pursue a similar telecommunications strategy. To promote domestic telecommunications development as well as global competition, the Commission must be willing to recognize in a quick and effective manner the competitive progress achieved by non-WTO Members. Rapid recognition of a nation's competitive design will bring immediate benefits to U.S. markets and will promote further competition in the foreign country. The Commission can promote the public interest while streamlining its ECO analysis to facilitate foreign investment in the U.S. wireless markets where appropriate.

The C Block PCS carriers will be more apt to generate these benefits with the creation of a new pool of capital opportunities from abroad. Although the Commission's WTO implementation proposals in the Notice advance considerably the finance opportunities for C Block PCS licensees, the proposals alone are not optimal. To maximize C Block foreign capitalization opportunities, the Commission should also reform its rules concerning entrepreneurs' block control group structures.¹⁷

Concurrent with elimination of the ECO test for WTO Member Countries, the Commission should reform its passive investor limit to permit non-controlling interests (up to 49.9%) by investors to be non-attributable.¹⁸ The reformation will remove domestic barriers to the C Block PCS carriers' abilities to attract capital under the increased opportunities presented by the WTO Agreement. In fact, there is some basis to question retention of the control group requirements on a going forward basis. The regulatory harmony will produce rapid development of U.S. wireless infrastructure and increased competition in wireless services.

The change in the ownership and attribution rules preserves the integrity of the Commission's policy of encouraging small business participation in the provision of spectrum-based

¹⁷ See 47 C.F.R. § 24.709.

¹⁸ Currently, a C Block licensee may not sell more than 25 percent of its passive equity to a single investor if the resulting attribution would exceed the \$125 million/\$500 million threshold.

services.¹⁹ In fact, the reformation would promote the success of entrepreneurs by reducing the C Block licensees' reliance on debt and permitting full realization of the heralded financial benefits of the WTO Agreement.²⁰

¹⁹ See 47 U.S.C. § 309(j)(4)(C); see also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 at ¶ 129 (1994) (the Commission noting that its "goals are to create significant opportunities for entrepreneurs, [and] small business . . . [to] attract sufficient capital to build-out those licenses and provide service") ("Fifth Report and Order").

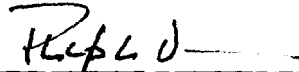
²⁰ See Fifth Report and Order at ¶ 10 ("The record clearly demonstrates that the primary impediment to participation by designated entities is lack of access to capital. This impediment arises for small businesses from the higher costs they face in raising capital"). The Chairman recognized the potential for the WTO Agreement to ameliorate this difficulty. See "Competition, Wireless Deployment, and New Spectrum Policy," by Chairman Reed Hundt (as prepared for delivery Mar. 4, 1997) ("[B]uildout and expansion needs are huge. Everyone knows you can't be the raiders of the local loop without a bankroll. One of the reasons the Clinton Administration is pleased with the WTO deal is that it means that American wireless companies will be free to build those bankrolls from investors around the world").

V. CONCLUSION

The WTO Agreement contemplates a global market for telecommunications services in which the greatest benefits flow to the most competitive and open environments. The Commission will promote the public interest by removing barriers to foreign investment in U.S. markets and permitting U.S. consumers to enjoy the dynamic efficiencies of global telecommunications. The Commission will enhance realization of the WTO Agreement's benefits by reforming its C Block PCS ownership and attribution rules, as well. For these and the foregoing reasons, the Commission should implement the WTO Basic Telecommunications Agreement in accordance with the proposals made herein.

Respectfully submitted,

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